Opinion No. 1148

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

TAX DIVISION

JUL 6 1977

FILED

JANTZEN, INC.,

Petitioner

v.

DISTRICT OF COLUMBIA,

Respondent

Tax Docket No. 2398

MEMORANDUM OPINION

This matter comes before the Court under Rule 10 of the Tax Division Rules, solely for our decision of the legal issues involved. Petitioner is appealing the denial by the District of Columbia Department of Finance and Revenue of its claim for a refund of corporate franchise taxes for fiscal year September 1, 1968 to August 31, 1969, in the amount of $407.72. It paid the tax on April 30, 1976, and thereafter filed a claim for refund which was denied by the District of Columbia on September 3, 1976. The present suit was then filed.

The parties, although not formally submitting a stipulation of facts relevant to our determination of the issues, are in full agreement as to those facts, which we will now extract from the documents which were submitted to the Court.

Petitioner is a Nevada corporation whose principal place of business is located in Portland, Oregon. For several years, petitioner has manufactured sportswear and

other apparel and sold its merchandise to retailers throughout the United States. These sales to retailers are generally made through sales representatives, who solicit orders from the retailers and who send the orders to petitioner's main office in Portland for acceptance or rejection. Upon acceptance of the orders, the merchandise is then shipped directly to the purchaser by common carrier from one of the warehouses utilized by petitioner, none of which are located in the District of Columbia.

The activities of petitioner Jantzen during the period in question are described in the deposition of W. Stanley Dilley (hereinafter "deposition"),[1/] sales representative for Jantzen, as well as in an affidavit of Robert Ludeman, Vice President of the men's division of Jantzen, Inc.[2/] During the period of September 1, 1968 through August 31, 1969, petitioner employed two sales representatives who maintained offices in the District of Columbia. One of these salesmen represented the men's division of Jantzen and the other represented the women's or misses' division. Each of these salesmen maintained an office in the District of Columbia. There is no indication in the material submitted whether these

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1/ Mr. Dilley was called for cross examination by the petitioner on January 24, 1977. He started working as a sales representative for Jantzen in June of 1970, which is after the relevant period in question. He stated, however, that the activities he described were the extent of Jantzen's business activities in the District of Columbia during the period with which we are concerned. (Deposition at 8.)

2/ This affidavit was attached to petitioner's brief as [illegible]. The District of Columbia admits that the relevant facts must be found in the deposition and it does not dispute any of the statements which appear in the affidavit. To the extent that these two documents state facts, as opposed to conclusions, we will assume them to be true.

two individuals chose the offices on their own and may have been reimbursed for their costs by Jantzen, or whether the offices were selected for them by petitioner. Nor is there any other mention of petitioner providing the sales representatives with anything, other than samples, to assist them during the course of their solicitations. Mr. Dilley stated in his deposition, however, that he had his own office in the District. It is clearly indicated in the record that petitioner itself had no office or warehouse in the District of Columbia during the period in question.

The duties of the two sales representatives during the relevant period were to solicit the sale of petitioner's apparel, such as sportswear and swimsuits, to retail stores in the District of Columbia. The representatives would show the retailers samples of apparel from which the stores could make selections, or the retailers could select merchandise from a catalog. If a retailer so desired, it would place an order with the salesman on an order form provided by Jantzen.

Either the salesman or a representative of the store would fill in the store's name, the particular order to be placed and the destination of the shipment. The Jantzen representative would add the dates that the order would be available or the date the store desired the shipment and he would then send the ord - to petitioner in Portland, Oregon, where it would be processed and

either accepted or rejected. The sales representatives had nothing to do with the receipt of the merchandise or its handling at any point along the way. The representatives essentially solicited the orders and sent them to Portland. They received no money in the transaction nor did they provide any assistance in the collection of the purchase price. These matters were handled exclusively by Jantzen through its home office.

Once the order was placed and processed by Jantzen, the order was shipped from one of petitioner's several warehouses by common carrier directly to the retailer. Jantzen had no merchandise on consignment in the District of Columbia during the taxable year in question and, in fact, its regular arrangement had been to limit its shipments to products which had been ordered by a particular retailer. The activities just described were the extent of the activities of the sales representatives of Jantzen during the relevant period and the extent of petitioner's own business connection with the District of Columbia.

The sole issue before the Court is whether §381 of Title 15 of the United States Code, enacted by Congress in 1959, precludes the District of Columbia from imposing a corporate franchise tax on petitioner, pursuant to D.C. Code 1973, §47-1571a,[3/] for the privilege of carrying

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3/ Since the franchise tax in issue here is for the period [illegible] 1, 1975 to [illegible] 31, 1979, the minor amendments to this section by the act of October 21, 1977, D.C. Law 2-32 (codified at D.C. Code §47-1571a (Supp. III 1976)), are insignificant for our purposes.

on a trade or business within the District, which tax is measured by the amount of net income derived from sources within this jurisdiction. The petitioner argues primarily that Congress, in enacting §381 as a proper exercise of its plenary power under the Constitution over interstate commerce,[4/] intended that the District of Columbia be restricted by the provisions of that statute in the same manner as the fifty states and their political subdivisions. The District of Columbia, on the other hand, principally contends that, since Congress did not specifically provide in either the language of §381 or in the legislative history which accompanied Public Law No. 86-272 that the limitations imposed under the statute would affect the taxing authority in the District of Columbia, it could not have intended to implicitly repeal or limit D.C. Code 1973, §47-1571a and §47-1551c (h)(1) and thus restrict its own plenary power to legislate for the District of Columbia.[5/] To apply Public Law No. 86-272 to the District of Columbia, respondent argues, would contravene this plenary power of Congress.

The issue as presented, although appearing at first to be straightforward and without complexity, apparently does involve a question of first impression

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4/ U.S. CONST. art. I, §8, cl. 3.

5/ U.S. CONST. art I, §8, cl. 17. See Palmer v. United States, 411 U.S. 389 (1973).

for the courts in this jurisdiction.[6/] We will therefore trace the relevant history of 8381 and attempt to determine Congress' intentions in passing that statute. Section 381 of Title 15 of the United States Code provides in part:

> (a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:
>
> (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
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> (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).
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> (b) The provisions of subsection (a) of this section shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to--

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6/ In what was apparently the only other case in which the issue was discussed, [illegible] v. [illegible], [illegible] F.2d [illegible] (1962), [illegible] U.S. [illegible] (1963), the court assumed for its purposes that 15 U.S.C. 381 applied to the District of Columbia, but held that General Motors was engaged in a trade or business in the District and did for more than merely promote the sale of its products here. It stated that for the same reasons that General Motors' operations subjected it to taxation in the District of Columbia, the provisions of Public Law No. 86-272 did not prevent it from being taxed. The Supreme Court reversed on other grounds, holding that the apportionment formula did not permit the application of an arbitrary formula which [illegible] as a sole factor to the exclusion of all other factors.

(1) any corporation which is incorporated under the laws of such State; or

(2) any individual who, under the laws of such State, is domiciled in, or a resident of, such State. 7/

It is apparent from a reading of the legislative history 8/ and cases which have considered the application and effect of this statute 9/ that Congress' sole purpose in enacting §381 was to respond to and allay the "considerable concern and uncertainty" in the business community caused by the broad language used by the Supreme Court in Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959). 10/ The specific doubt which businessmen had at that time was the amount and nature of local activities

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7/ 15 U.S.C. §381(a)(b) (1973) (originally enacted as Public Law No. 86-272, Title 1, §101, 73 Stat. 555). There is no evidence in this case that §381(c), dealing with the applicability of §381(a) to the solicitation of orders of tangible personal property by independent contractors, as defined in paragraph (d), is applicable. Neither party has suggested that Jantzen's sales representatives were "independent contractors."

8/ See S. REP. NO. 658, 86th Cong. 1st Sess. 2-3 and H.R. CONF. REP. NO. 1103, 86th Cong. 1st Sess. 4, reprinted in (1959) U.S. CODE CONG. & ADM. NEWS 2548, 2549, 2560; H.R. REP. NO. 936, 86th Cong. 1st Sess. (1959). See Note, State Taxation of Interstate Commerce: Public Law 86-272, 46 VA. L. REV. 297 (1960) (hereinafter "Note"); 105 CONG. REC. 16353 (1959).

9/ See e.g., Hamblin, Inc. v. South Carolina Tax Comm'n, 409 U.S. 275, 279-280 (1972); [illegible] v. Department of Rev. of Ore., 546 P. 2d 1061 (Or. 1976) (and cases cited therein); State ex rel. Olin Pharmaceutical Products, Inc. v. State Tax Commission, 502 S.W. 2d 645 (Mo. 1973); Gurley v. NCR Realty, Inc., 250 Ark. 149, 464 S.W. 2d 557 (1971); International Shoe Co. v. Corcoran, 246 La. 244, 164 So. 2d 314, cert. denied, 379 U.S. 902 (1964); Oklahoma Tax Comm'n v. International Harvester Co., 420 P. 2d 864 (Okla. 1966); Admiral, Inc. v. [illegible], 107 N.J. Super. 22, 262 A. 2d 213, aff'd 57 N.J. 199, 270 A. 2d 702 (1970), appeal dismissed 402 U.S. 902 (1971).

10/ The companion case decided was Williams v. Stockham Valves & Fittings, Inc., 358 U.S. 450 (1959). The language in Northwestern which generated the serious apprehension in a large portion of the commercial community engaged in interstate commerce was the following (358 U.S. at 452):

(Continued on following page)

which would be deemed to create a "sufficient nexus" for the exercise of a state's power to tax. The business community feared that sales within a state obtained through the mere solicitation of business within the state by an out-of-state company having no other activities in that state would provide the "nexus" within the meaning of Northwestern to subject them to state taxation.[11] The basis for the concern of all businessmen was strengthened when the Supreme Court, shortly after the Northwestern decision, denied review in two cases in which the state court upheld a tax on income derived from solicitation alone.[12] Moreover, prior to Northwestern, most states made no attempt to levy income taxes on businesses engaged solely in interstate commerce.[13] And yet, after that

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10/ (Continued from previous page)

> We conclude that net income from the interstate operations of a foreign corporation may be subjected to State taxation provided the levy is not discriminatory and is properly apportioned to local activity within the taxing State [illegible] to support the tax. [Emphasis supplied.]

11/ S. Rep. No. 658, supra note 8, at 2549, 2550. See [illegible], 409 U.S. at 279-280.

12/ See [illegible] Corp. v. Collector of [illegible], 234 La. 651, 101 [illegible] (1958), appeal [illegible] cert. denied 359 U.S. 29 (1959); International [illegible] Co. v. [illegible], 236 La. 275, 107 [illegible] 2d 670 (1958), [illegible] 359 U.S. 994 (1959). In these cases, the companies maintained no office in Louisiana, nor did they have any inventory, warehouse or other tangible nexus to the State. It appears, however, that the Supreme Court of Louisiana has reconsidered these decisions in light of Public Law No. 86-272. See [illegible], 246 La. 244, 164 So. 2d [illegible] note 8, at 299-300; H.R. Rep. No. [illegible], supra note 8, at [illegible].

13/ See [illegible] -- Federal Limitations On [illegible], 75 HARV. L. REV. [illegible] (1962).

decision, it appeared that several states enacted new laws or issued interpretations of their existing statutes to impose taxation in circumstances which in the past had been exempt.[14]

To alleviate the deep concerns expressed by the business community over their "threatened economic futures," Congress enacted Public Law No. 86-272, codified as 15 U.S.C. §381, in which it adopted a "minimum activities" approach.[15] Section 381 was designed to define the limit below which a state, or political subdivision thereof, could not exercise its power to tax businesses engaging in interstate commerce, which were at the same time soliciting a portion of their business within the taxing state.[16] It was intended to extirpate the pernicious

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14/ See Note, supra note 8, at 301 and n. 3, n. 19.

15/ S. REP. NO. 658, supra note 8, at 2548. See generally, the debates on the floor of Congress August 19 and August 20, 1959, relating to the consideration of S. 2524 beginning at 105 CONG. REC. 16353 (1959). Congress did not intend Public Law No. 86-272 to be a permanent solution to the problem which it recognized existed. S. REP. NO. 658, supra note 8, at 2551.

It generally believed that the problem was a complex one which required extensive and exhaustive study in order to reach a permanent solution which would be equitable to both the states and the nation. Id. Thus, in Title II of Public Law No. 86-272, Congress provided that the Committee on the Judiciary of the House of Representatives and the Committee on Finance of the Senate would thoroughly study all matters pertaining to state taxation of income derived within the states from businessmen's interstate operations and report the results of such studies before July 1, 1965. 73 Stat. 556. Title II of Public Law No. 86-272, as amended, was struck out by the Tax Reform Act of 1976, Public Law No. 94-455, Title XIX, §1912.(a), 90 Stat. 1914, and a new Title II was added which became 15 U.S.C. §391. The new section merely restricted states from imposing a tax on or with respect to the generation or transmission of electricity.

16/ Heublein v. South Carolina Tax Com'n, 409 U.S. at 280.

dicta in Northwestern, while preserving the entire body of decisions relating to the collection of income taxes under taxing statutes in existence long before the decision in Northwestern.[17]

The primary "minimum activity" set forth in §381 was the solicitation of orders. Congress sought in that section to protect a business from state taxation based on net income if the only business activity within the state by or on behalf of such company is the solicitation of orders for the business itself, or for its prospective customers.[18] Furthermore, in order to qualify for the "immunity" from taxation by the state, all orders that are solicited must be sent outside the state for approval or rejection, and if approved, must be filled by shipment or delivery from a point outside the state.[19] Thus, in order to come within the purview of §381, the only business activity in which a business' sales representatives could engage in a particular state would be the solicitation of orders.[20] By clearly stating what activities would not result in taxation by the states to the operations of businesses engaged in interstate commerce on the income derived

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17/ [illegible] (Reports of Senate Committees). In [illegible] these decisions, the Senator explained, [illegible] which was "[illegible] business" in the state, or where [illegible] had an office, warehouse or a stock of goods within the state, historically [illegible] subject to taxation by the [illegible] state. [illegible] at 1035. In fact, in Northwestern and [illegible] Wilson cases, 268 U.S. 459, the company involved had a sales office located within the state.

18/ See District of Columbia v. General Motors Corp., 118 U.S. App. D.C. at [illegible].

19/ 15 U.S.C. § [illegible]. [illegible] the facts of this case, [illegible] paragraph of §381(a) [illegible].

20/ [illegible] Inc. v. Department of Rev. of Ore., [illegible].

therefrom, Congress believed it was removing the uncertainty generated by the decision in Northwestern.[21] For example, the legislative history points out that the immunity provisions of §381(a) are not available if an out-of-state company maintains a warehouse or a stock of goods within the state.[22]

The parties here suggest, and we must agree, that certain problems arise when §381 is considered along with D.C. Code 1973, §47-1571a and §47-1551c(h)(1), under which the District of Columbia contends it has the authority to impose the franchise tax at issue here on Jantzen's activities. Congress in the Income and Franchise Tax Act of 1947, imposed a tax on corporations engaging in a trade or business within the District of Columbia.[23] Section 47-1571a provided during the period relevant to the case before us:

> For the privilege of carrying on or engaging in any trade or business within the District and of receiving income from sources within the District, there is hereby levied for each taxable year a tax at the rate of 8 per centum upon the taxable income of every corporation, whether domestic or foreign (except those expressly exempt under section 47-15[illegible]). The minimum tax payable shall be $25.00.[24]

21/ See [illegible] v. [illegible], [illegible] U.S. at 250. A reading of the [illegible] legislative history reveals that Congress was also concerned [illegible] the diversity of formulas utilized by the states [illegible] the apportionment of taxes, as well as with the [illegible] of large retroactive levies by the states. S. Rep. No. 658, supra note 8, at 2550-2551. The problem of the possibility of businesses paying substantial income taxes to states for years preceding 1959 was resolved in 15 U.S.C. §382.

22/ S. Rep. No. 658, supra note 8, at 2554. See generally the debates in Congress, supra note 15, 105 Cong. Rec. at 16470.

23/ Ch. 258, Title VII, §2, 61 Stat. 345 (1947).

24/ D.C. Code 1973, §47-1571a. This section has been amended several times, the most significantly dealing with the rate of tax. The last amendment was in 1975. See note 3, supra. Section 47-1501 defines "taxable income" to mean the [illegible] of net income derived from sources within the District of Columbia within the meaning of §§47-1580 to 47-1586b.

In the Act of May 3, 1949,[25] Congress amended the definition of the words "trade or business" to exclude the following:

> Sales of tangible personal property whereby title to such property passes within or without the District, by a corporation or unincorporated business which does not physically have or maintain an office, warehouse, or other place of business in the District, and which has no officer, agent, or representative having an office or other place of business in the District, during the taxable year; [26]

The District of Columbia presumably would argue that, since petitioner's sales representatives maintained offices within the District of Columbia, petitioner was subject to the payment of franchise taxes under the provisions of the D.C. Code cited above. It does argue, as previously stated, that it had the power to impose a franchise tax on petitioner regardless of §381 of Title 15 of the United States Code, and in spite of the fact that petitioner's activities in the District of Columbia were limited to the mere solicitation of orders, as long as petitioner was engaging in any trade or business within the District within the meaning of that term.[27] It is the position of petitioner, however, that Congress intended the limitations prescribed in §381 to apply to the District of Columbia, and if, as a result, the franchise tax provisions of the D.C. Code have been implicitly limited or modified, then Congress certainly had the authority under the exercise of its power under the Commerce Clause to cause such a result.

25/ Ch. 240, 81, 63 Stat. 100 (D.C.).

26/ D.C. Code 1973, §47-1551c(h)(6).

27/ See D.C. Code 1973, §47-1551c(a).

Although petitioner's primary contention is that Congress must have intended 8391 to apply to the District of Columbia so as to restrict its taxing authority in the circumstances here, such a conclusion is not totally free of doubt. The Judiciary Committee, which was commissioned to study the problem of state taxation of interstate commerce, [28] stated in its final report:

> Since the District's franchise tax is imposed by act of Congress, the power to apply it to interstate corporations would not seem to be restricted by the commerce clause. [29]

In another portion of the same report, the Committee said that "absent some need for making the distinction, Alaska, Hawaii, and the District of Columbia are treated as States, regardless of their political status at the time." [30] Moreover, it would have been unnecessary for Congress to provide in Public Law No. 86-272 that "no State, or political subdivision thereof, or the District of Columbia shall have the power to impose * * *" a net income tax since it was Congress and not the District of Columbia's own sovereign legislative body which wrote the tax legislation for this jurisdiction when the statute was passed.

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[28] See note 15 supra.

[29] REPORT OF THE SPECIAL SUBCOMMITTEE ON STATE TAXATION OF INTERSTATE COMMERCE, VOL. I, H.R. REP. NO. 1480, 88th Cong., 2d Sess. 14, 15 (1964). See also Heald v. District of Columbia, 71 U.S. App. D.C. 306, 311, 110 F. 2d [illegible], 251 (1939).

[30] Id. at 99. This would seem to negate petitioner's conclusion that, since the District of Columbia was treated as a "State" in these statutes, Congress must have intended it to be a "State" within the meaning of 15 U.S.C. [illegible]. The remaining portions of the study conducted by the Commercial Activities [illegible] are found in H.R. REP. NO. 565, 87th Cong., 1st Sess. (1961); H.R. REP. NO. 942, 87th Cong., 1st Sess. (1961); H.R. REP. NO. 1480, 88th Cong., 2d Sess. (1964). Congress has enacted [illegible] to provide that the [illegible] shall also include [illegible] pertaining to the [illegible] of [illegible] by the District of Columbia. [illegible] Law No. 87-11, [illegible] Stat. 41 (1961).

We find it difficult to believe, however, considering the nature of the problem with which Congress was faced, its national dimensions,[31] and the general concerns of the business community, that Congress would have adopted a solution to the dilemma and enacted Public Law No. 86-272 without intending it to be applicable to the District of Columbia. The Supreme Court in Wrublein said that in Public Law No. 86-272 Congress implicitly determined that a state's interest in taxing business activities below a certain limit was weaker than the national interest in promoting an open economy.[32] Perhaps the reason there is no specific mention of the applicability of the provisions of Public Law No. 86-272 to the District of Columbia is because, as finally passed, Congress felt that the law was fully compatible with the franchise tax provisions of the D.C. Code, and would not alter the situations in which the District imposed this tax.

Although we believe this observation to be true, this Court need not decide for purposes of this opinion whether or not Public Law No. 86-272 is applicable to the District of Columbia. As in District of Columbia v. General Motors Corp.,[33] we will assume that Congress intended it to apply.[34]

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[31] [illegible] its report stated (S. Rep. No. 432, [illegible] Note 5, at 2-3):

> Your committee believes that, unless some certainty is restored to this area, the economic implications for the economy of the entire Nation may be unfortunate.

[32] 409 U.S. at 280. It would seem that, considering the circumstances [illegible] Public Law No. 86-272 and the [illegible] applicability of that law, the District of Columbia should be considered a "State" within the meaning of [illegible], e.g., [illegible] v. [illegible], 409 U.S. [illegible], 420, 422 (1975).

[33] [illegible] App. D.C. [illegible], [illegible] n. 12, 536 F. 2d [illegible], [illegible].

[34] We note that the government did not address itself to all the questions raised if it were determined that Public Law No. 86-272 was applicable to the District of Columbia.

Having assumed such applicability, we therefore must determine whether or not the activities of Jantzen in the District of Columbia were limited to the solicitation of orders, within the meaning of §381, thus bringing these activities within the immunity granted by that section. The District of Columbia has practically conceded that the extent of petitioner's activities in this jurisdiction during the period in question was limited to the solicitation of orders through two sales representatives, who maintained their own offices, and who sent the orders outside the jurisdiction for acceptance or rejection, and if approved, were filled by shipment from a point outside the District.[35/] We will also assume for purposes of this opinion that, since the District did not indicate otherwise, petitioner was subject to the District of Columbia franchise tax under D.C. Code §47-1571a and §47-1551c(h), because of the fact that its sales representatives maintained an office or offices within the District.[36/]

The question to be determined by this Court, assuming the applicability of §381, is whether because of the fact that petitioner's sales representatives maintained offices here in the District of Columbia, it would lose its immunity from taxation under §381 which it otherwise might have enjoyed. Before the enactment of Public Law No. 86-272, the Senate Finance Committee held hearings on three bills which had been introduced and which all used a "minimum activities" approach.[37/] It is interesting to note that

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35/ See Brief for Respondent (April 7, 1977): Affidavit of Robert [illegible]man, note 2 supra.

36/ See, e.g., [illegible] Co. v. District of [illegible], 92 [illegible] 103 [illegible].

37/ The bills were S.J. RES. NO. 113, S. 2213 and S. 2281. See [illegible], at [illegible] n. 51 for the complete text of these bills.

one of the bills was patterned after D.C. Code 1951, §47-1551c(h).[38] Instead of adopting one of the bills referred to it, the Committee reported out a new bill, S. 2524.[39] As originally written, subsection (a) of §1 of the bill provided that no state shall have the power to impose a net income tax on income, or a tax measured by net income, on the income derived within such state by any person from interstate commerce, if the only business activities within such state were those set forth in paragraphs (1) and (2), which became 15 U.S.C. §381(a)(1) and (2), respectively.[40] However, S. 2524 also contained a paragraph (3), which added another business activity which would be exempt from state taxation. That activity was:

> (3) the maintenance and operation by such person, or by his representative, in such State of an office the primary purpose and use of which is to serve representatives of such person who are engaged in the solicitation of orders described in paragraphs (1) or (2), or both, and to receive, process, and forward such orders.[41]

An amendment introduced by Senator Talmadge on August 29, 1959, struck this entire paragraph which granted immunity when such a business employed a sales office.[42] The Senator believed that the inclusion of such a provision would be going further than necessary to counteract the effects in [illegible] and would permit in the Congress granting an immunity to businesses never before upheld in the case law.[43]

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[38] S. 2524, [illegible].

[39] Id. at 2527. The report which we have referred to several times, S. Rep. No. [illegible], recommended this bill.

[40] S. Rep. No. [illegible], [illegible], at 2546.

[41] See S. Rep. No. [illegible], [illegible] note 5, at 2552, 2553. Note, [illegible], at [illegible].

[42] 105 Cong. Rec. [illegible] (1959).

[43] See note 17 supra.

The debate on this amendment was heated and informative.[44] Senator Kerr, who strongly opposed the amendment, made these remarks:

> My good friend from Georgia says that he is in favor of the exemption for the outside person, corporation, or partnership who sends a representative into the State to take an order. The Senator says he is for the exemption if that person takes the order and writes it up in the home of the customer, or in his own home, or in his hotel room, or in a privy, or simply anywhere except in an office. The Senator is against the man having an office, because he says the office is a nexus. * * * [I]f the man has an office, that is considered a nexus, and he would be given no exemption. [45]

He summarized his views, and apparently those of his colleagues in the minority, with respect to the significance of a salesman who maintained an office:

> We say that if there is a salesman in the State, the salesman does not have to go to a hotel room, or to the home of the customer, or to the city park, or to a privy somewhere, to make out the orders and send them in. The salesman can go to the office and send the orders in. That will not be so terrible as to constitute a nexus and, therefore, to make him ineligible for an exemption. [46]

Congress apparently found the views expressed by Senator Talmadge more persuasive and passed the amendment deleting the paragraph which granted immunity for sales offices.[47]

A thorough reading of the debates in the Senate on S. 8504 leads this Court to only one conclusion -- a business would not be exempt from taxation under §381 where either itself or its sales representative maintained an office, as in the case of the representatives of Jantzen, in the state seeking to tax these activities. This conclusion is based

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[44] For [illegible] and in Volume [illegible] of the Congressional Record, 105 CONG. REC. 16[illegible] (1959).

[45] 105 CONG. REC. [illegible] (1959).

[46] Ibid.

[47] Id. at 16477. The amendment passed 65-29.

primarily on the fact that paragraph (3), which would have granted such immunity, was dropped by the amendment introduced by Senator Talmadge.[47] There may still be a question, however, as to whether or not the activities of Jantzen in this case come within the term "solicitation" and, on that basis, in spite of the amendment of Senator Talmadge, would be immune from taxation under §381. From the outset, the meaning of the term "solicitation" was the subject of much discussion. It was unclear, for instance, whether such factors as the presence of sample goods, the rental of display rooms, the use of a salesman's home or hotel room for business purposes, the interstate shipment of products in business-owned vehicles, and the servicing or supervision of installation of merchandise were merely activities incidental to solicitation, and thus within the statute, or were distinct activities which either alone or in conjunction with other activities, extended the minimum contacts of the business beyond mere solicitation.[49] It was felt at the time that no one knew the parameters of the term.[50] The cases which have interpreted §381 have answered some of these questions in trying to formulate a workable definition of solicitation.[51] None, however, were faced with the identical factual situation with which

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[47] [illegible] are the c[illegible] [illegible] on this question, [illegible] committee [illegible] no mention of the effect of [illegible] amendment at all, [illegible] more wei[illegible] [illegible] the [illegible]. Cf. [illegible] Federal Tel. [illegible] v. [illegible] Tel. [illegible], [illegible] F.[illegible] 913, 9[illegible] ([illegible] Cir. 197[illegible]).

[49] [illegible] Federal [illegible] [illegible], [illegible] [illegible] 93, [illegible].

[50] [illegible] Lack of [illegible] [illegible], 46 [illegible] L. [illegible], [illegible].

[51] [illegible] v. Department [illegible] [illegible] [illegible] at 10 [illegible] cited in [illegible].

we are concerned.[52/] It was stated in a few of these cases that the term "solicitation" should be construed narrowly, but given its generally accepted meaning in light of the legislative history.[53/] It should not include those activities which follow as a natural result of the solicitation, such as, collections, serving complaints, technical assistance and training.[54/] In Heublein, the Supreme Court left open the question whether activities such as the representative maintaining a local office, meeting with retailers and distributing promotional literature fell within the meaning of the term "solicitation" since it found other activities to be beyond mere solicitation.[55/]

In the studies conducted following the enactment of Public Law No. 86-272, the Committees of Congress surveyed all the states to determine how each state interpreted the "nexus" standards for purposes of the imposition of income or franchise taxes on corporations doing business within their boundaries. The results of the survey revealed that the District of Columbia overall took a liberal view of the nexus requirements in favor of the out-of-state corporation, although it imposed franchise taxes on corporations whose salesmen regularly solicited orders here and

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52/ In [illegible] v. [illegible], [illegible] So. 2d [illegible], the salesman travelled; in [illegible] Pharmaceutical Specialties, Inc. v. [illegible] Tax [illegible], [illegible], the professional service representatives worked out of their homes; and in [illegible] Com'n v. [illegible] Distillers Corp., 420 [illegible], it is not clear where the non-salaried employee worked.

53/ See, e.g., Hervey v. AMF Beird, Inc., 250 Ark. 147, 264 S.W. 2d at 50[illegible]; [illegible], Inc. v. Department of Rev. of Ore., 546 F. 2d at [illegible]; [illegible] v. [illegible], [illegible] Or. 453, 410 P. 2d 233, [illegible] (1966).

54/ See 546 F. 2d at 10[illegible]3.

55/ 420 U.S. at 278. In both the Northwestern and Stockham [illegible] cases, the corporations [illegible] sales offices in the State. 358 U.S. at [illegible]. Public Law No. 86-272 was [illegible], however, as a protection against the [illegible] in those cases. It was not intended to overrule the holding in those cases. See text accompanying note 17 supra.

either resided in the District using their homes for maintaining records, or had a sales office in the District. In the situation where the salesman regularly solicited orders here but had no office in his home or elsewhere, the District of Columbia, at least at that time, imposed no franchise taxes where the following contacts were also present: the salesman used a telephone answering service and had a local directory listing; the corporation was qualified to do business in the District; the company's products were shipped C.O.D. into the District; security interests were retained on all goods sold; credit investigations and collections were conducted by the salesman; goods were delivered into the District in vehicles owned by the company; installation or assembly of the company's products was done by the salesman (unless there was a charge for this service); the acceptance of orders was handled in some instances by the salesman; and finally, where the service or repair of the products was performed at no additional charge. [52] The presence of these activities, especially some of the latter ones mentioned, provided a sufficient nexus in the view of many of the states upon which to justify the taxation of out-of-state companies. [53]

The overall effect of Public Law No. 86-272 on the past practices of the District of Columbia in taxing out-of-state businesses such as Jantzen is beyond the scope of

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[52] [illegible], Vol. 1, H.R. Rep. No. [illegible], 88th Cong., 1st Sess. 1963).

[53] [illegible].

this opinion. We are only concerned with the effect of the maintenance of an office here for use by the sales representatives of Jantzen. In summarizing a small portion of its study, the special subcommittee on state taxation stated that, if a state imposes a franchise tax, liability depends upon whether a corporation conducts within the state any activities which fail to meet the standard of solely interstate commerce. 58/ The District of Columbia was acting within the proper limits of its authority when it determined that the activities of Jantzen were taxable under the provisions of D.C. Code §47-1571(a) and §47-1551c (h)(1). We find that the activities of Jantzen in the District of Columbia went beyond the mere solicitation of orders which Congress in Public Law No. 86-272 intended to exempt from state taxation.

Our decision is supported by the "cardinal principle" in statutory construction that repeals by implication are not favored. 59/ To reach the conclusion petitioner urges, would necessitate our finding that Congress in §381 implicitly repealed or limited portions of the District's franchise tax provisions. We cannot find sufficient basis upon which to reach such a conclusion.

58/ [illegible]

59/ See United States v. [illegible], 335 U.S. [illegible], [illegible] (1949); [illegible] v. [illegible], 422 U.S. 25, [illegible]-250 (1975); [illegible] Act Cases, 419 U.S. 10, [illegible] (1974); [illegible] v. [illegible], 417 U.S. 535, 549-550 (1974); [illegible] v. [illegible], 156 U.S. App. D.C. 121, [illegible]-130, 479 F. 2d 642 (1973).

Accordingly, we find that petitioner's claim for a refund of corporate franchise taxes paid for the period of September 1, 1968 to August 31, 1969, in the amount of $407.72 must be denied.

SO ORDERED.

FRED B. UGAST
Judge

Dated: July 26, 1977

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